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Fellows v. National Enquirer: Limiting the False Light Invasion of Privacy Tort

Under section 45a of the California Civil Code, a plaintiff who brings a libel action must prove special damages¹ if the suit is based on language that is not libelous on its face.² This statute is designed to protect publishers who make statements that are defamatory only because of extrinsic facts known to the reader.³ Historically, proof of special damages was not an element of the common law tort of false light invasion of privacy,⁴ [hereinafter false light] even though false light claims frequently arise under facts identical to those which could support a libel claim.⁵ In *Fellows v. National Enquirer*,⁶ however, the California Supreme Court found that the public policy embodied in Civil Code section 45a applies to false light actions based upon a defamatory publication.⁷ In *Fellows*, the court held that a false light plaintiff must plead and prove special damages when the claim is based on language that is defamatory only by reference to extrinsic facts.⁸

Part I of this note discusses the legal background of both defamation and false light, and explores the recent development in

1. Special damages are all damages in which the plaintiff alleges and proves injury to plaintiff's property, business, trade, profession, or occupation, including such amounts of money as the plaintiff alleges and proves was expended as a result of the alleged libel, and no other. CAL. CIV. CODE § 48a(4)(b) (West 1982).

2. Section 45a provides in pertinent part:

A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof.

CAL. CIV. CODE § 45a (West 1982).

3. *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 550, 343 P.2d 36, 43 (1959). For example, if a newspaper falsely published an article which stated that "the murderer lives at 200 Elm Street," when in fact an innocent person lived at that address, that innocent person would have been defamed only to the extent that a reader knew that the innocent person lived at 200 Elm Street. Under Civil Code section 45a, the innocent person would be unable to recover for defamation without proving special damages.

4. See *infra* text accompanying notes 18-24.

5. *Fellows v. National Enquirer*, 42 Cal. 3d 234, 246, 251, 721 P.2d 97, 105, 108, 228 Cal. Rptr. 215, 223, 227 (1986).

6. 42 Cal. 3d 234, 721 P.2d 97, 228 Cal. Rptr. 215 (1986).

7. *Id.* at 251, 721 P.2d at 108, 228 Cal. Rptr. at 227.

8. *Id.* at 251, 721 P.2d at 109, 228 Cal. Rptr. at 227.

California case law that led to the decision in *Fellows*. Part II summarizes the facts of the *Fellows* case and reviews the decision of the California Supreme Court. Finally, the legal ramifications of the opinion in *Fellows* will be discussed in part III of this note.

I. LEGAL BACKGROUND

A. Privacy in Tort Law

The development of tort actions for the protection of privacy interests has been greatly influenced by legal periodicals.⁹ Prior to 1890, English and American courts had not expressly granted relief for a so-called "right of privacy."¹⁰ A few nineteenth century cases, however, seemed to imply that a right to privacy existed,¹¹ and one legal scholar had articulated the existence of "the right to be let alone."¹² The tort of invasion of privacy was first suggested by Samuel D. Warren and Louis D. Brandeis in their acclaimed 1890 *Harvard Law Review* article, *The Right to Privacy*.¹³ The article expressed concern with the increasing intrusions of the press upon the private lives of individuals.¹⁴ The authors argued that these intrusions necessitated a remedy upon the distinct ground of right to privacy in order to protect the individual against the unreasonable infliction of mental pain and distress.¹⁵ In 1960, Dean Prosser undertook an evaluation of over 300 cases decided since the Warren-Brandeis article and determined that the invasion of privacy theory

9. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 849 (5th ed. 1984) [hereinafter PROSSER AND KEETON]. Legal scholars have had considerable difficulty defining the term "right of privacy." See Davis, *What Do We Mean by "Right of Privacy"?*, 4 S.D.L. REV. 1 (1959).

10. PROSSER AND KEETON, *supra* note 9, at 849.

11. See, e.g., *Lord Byron v. Johnston*, 2 Mer. 29, 35 Eng. Rep. 851 (1816) (authorship of spurious poem attributed to Lord Byron); *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881) (intrusion upon childbirth).

12. See T. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 29 (2d ed. 1888).

13. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The article by Warren and Brandeis had a profound and almost immediate impact and "has come to be regarded as the outstanding example of the influence of legal periodicals upon the American Law." Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383 (1960).

14. Warren & Brandeis, *supra* note 13, at 196.

15. *Id.* In their article, Warren and Brandeis revealed prophetic insights about the industry of gossip: "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery." *Id.*

advanced in the article had developed into four independent torts.¹⁶ "False light in the public eye" was one of these torts.¹⁷

False light privacy cases involve publicized misinformation that creates a false impression about the life or behavior of an individual.¹⁸ The publication need not be degrading or highly personal, and in fact, may present the plaintiff "more favorably than reality warrants."¹⁹ In a false light action, the publication need not be defamatory,²⁰ although the publication frequently is defamatory.²¹ In order to be actionable, the injurious publication must be highly offensive to a reasonable person.²² The publication must attribute to the plaintiff characteristics, actions, or beliefs that are false, thereby portraying plaintiff in a false light.²³ The essence of a false light claim is that publication of the falsehoods injures the plaintiff's dignity.²⁴

Courts throughout the United States have split on the question of whether false light claims can be clearly distinguished from libel claims.²⁵ California courts have traditionally viewed false light as an independent tort which shares certain elements of a libel action,²⁶ yet differs from that tort in a few significant respects.²⁷ California Civil

16. See Prosser, *supra* note 13, at 389. The four separate torts articulated by Prosser include: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. *Id.*

17. *Id.*

18. See RESTATEMENT (SECOND) OF TORTS § 652E (1976).

19. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 296 (1983).

20. See Zolich, *Laudatory Invasion of Privacy*, 16 CLEV-MAR. L. REV. 532 (1967).

21. See, e.g., *Bennet v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959) (public accusation of theft); *Linehan v. Linehan*, 134 Cal. App. 2d 250, 285 P.2d 326 (1955) (public statement that plaintiff not lawfully married).

22. RESTATEMENT (SECOND) OF TORTS § 652E (1976). See *Strickler v. National Broadcasting Co.*, 167 F. Supp. 68, 71 (1958) (the trier of fact must determine whether fictitious allegations of plaintiff's conduct during an airplane crisis would be objectionable to a reasonable person); *Carlisle v. Fawcett Publications, Inc.*, 201 Cal. App. 2d 733, 748, 20 Cal. Rptr. 405, 415 (1962) (hypersensitive plaintiff who claimed mental anguish as result of publication describing his teenage romance and marriage, will not be protected by this cause of action, since the protection afforded must be restricted to "ordinary sensibilities").

23. RESTATEMENT (SECOND) OF TORTS § 652E comment b (1976).

24. See Zimmerman, *supra* note 19, at 296-97.

25. Note, *Renwick v. News & Observer Publishing Co.: North Carolina Rejects the False Light Invasion of Privacy Tort*, 63 N.C.L. REV. 767, 770 (1985).

26. See *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 120, 14 Cal. Rptr. 208, 214 (1961). The court explained the distinction between the two torts: "The right of privacy concerns one's own peace of mind, while the right of freedom from defamation concerns primarily one's reputation." *Id.* at 116, 14 Cal. Rptr. at 211.

27. See, e.g., *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 79, 155 Cal. Rptr. 29, 39-40

Code section 45 defines libel as a false and unprivileged publication which exposes any person to hatred or ridicule, or which has a tendency to injure that person in their occupation.²⁸ Several commentators have suggested that the false light tort is merely an unnecessary duplication of the cause of action that exists under the statutory definition of libel.²⁹

The lingering debate over the two torts focuses primarily on the extent to which the false light tort is intended to protect interests different from those interests protected by defamation actions.³⁰ Some jurisdictions have followed Prosser's basic tenet that false light, like defamation, is primarily intended to protect the reputational interest of individuals.³¹ Prior to the decision in *Fellows*, the California courts had frequently attempted to resolve the issue of whether false light is primarily intended to protect and compensate for damage to the plaintiff's reputation, or to compensate for injury to plaintiff's peace of mind and feelings.³² Courts must distinguish between the two torts

(1979) (libel may arise from publication of a defamatory statement to only one person); *Kinsey v. Macur*, 107 Cal. App. 3d 265, 270, 165 Cal. Rptr. 608, 611 (1980) (false light requires publicity of the falsehood to a substantial number of people). In California, a libel must defame the plaintiff in the manner described in Civil Code section 45, while actionable false light publicity need merely be objectionable to a reasonable person. *See, e.g., Carlisle v. Fawcett Publications, Inc.*, 201 Cal. App. 2d 733, 20 Cal. Rptr. 405 (1962) (not libelous for a magazine article to state that when plaintiff and defendant, a well-known film actress, were teenagers, they held hands, kissed each other and got married); *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 279-80, 239 P.2d 630, 634-35 (1952) (magazine photograph displaying husband and wife plaintiffs above caption depicting them as "persons whose only interest in each other was sexual," was sufficient ground to state cause of action for false light invasion of privacy); RESTATEMENT (SECOND) OF TORTS, § 652E comment c (1976) (plaintiff's privacy is not invaded when unimportant false statements are made).

28. CAL. CIV. CODE § 45 (West 1982).

29. *See Note, Right of Privacy: Is "False Light" Recognized in California?—Werner v. Times-Mirror Co.*, 50 CALIF. L. REV. 357, 364 (1962) (stresses that in most false light cases another remedy exists, but when another remedy does not exist, the plaintiff's interests should be subjugated to those of the press). *See also Comment, Privacy: The Search For a Standard*, 11 WAKE FOREST L. REV. 659, 669-70 (1975).

30. Prosser distinguished the interests protected by the false light tort from libel as follows: "The false light tort need not be defamatory [I]t must be something that would be objectionable to the ordinary reasonable man under the circumstances." Prosser, *supra* note 13, at 400. "The false light cases obviously differ from those of intrusion, or disclosure of private facts. The interest protected is clearly that of reputation." *Id.* *See Note, Tort Recovery for Invasion of Privacy*, 59 NEB. L. REV. 808, 825 (1980) ("the quintessence [sic] of the false light action is the protection of the plaintiff's reputation rather than his or her right to be free from the public's scrutiny").

31. *Fellows v. National Enquirer*, 42 Cal. 3d 234, 247 n.12, 721 P.2d 97, 106 n.12, 228 Cal. Rptr. 215, 224 n.12 (1986).

32. *See Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 116, 14 Cal. Rptr. 208, 211 (1961) ("The right of privacy concerns one's own peace of mind, while the right to freedom from defamation concerns primarily one's reputation. The injury is mental and subjective."); *Kapellas v. Kofman*, 1 Cal. 3d 20, 35 n.16, 459 P.2d 912, 921 n.16, 81 Cal. Rptr. 360, 369

in this way in order to determine whether the constitutional and statutory limitations on libel actions are applicable to claims brought under the false light theory.

B. *The Constitutional Privilege and False Light Claims*

The United States Supreme Court has held that state defamation laws³³ are limited by the free-speech and free-press provisions of the first amendment.³⁴ Prior to *New York Times v. Sullivan*,³⁵ the Supreme Court took the view that defamatory language was not entitled to constitutional protection.³⁶ Defamatory language was viewed as being of such slight social value that any benefit derived from such language was "clearly outweighed by the social interest in order and morality."³⁷ In *New York Times* the Supreme Court determined the extent to which the constitutional protections for speech and press place limits on state defamation laws.³⁸ The Supreme Court examined the issue of whether the falsity of a publication should effect a forfeiture of the constitutional protections afforded speech and press.³⁹ In finding that defamatory speech is entitled to constitutional protection, the Court articulated a strong national commitment to the principle that debate on public issues should be robust and uninhibited,⁴⁰ and proclaimed: "[t]he constitutional protection does not turn upon the 'truth, popularity, or social utility of the ideas and beliefs which are offered.'"⁴¹ The Court held that a public official could not recover under a defamation claim without proof that the media defendant had actual knowledge of the falsity of the statement or

n.16 (1969) (where complaint contains a specific cause of action for libel, the privacy count, if intended to rest on allegedly false nature of the statements, is superfluous and should be dismissed).

33. Defamation includes both libel and slander. See CAL. CIV. CODE § 44 (West 1985) (slander); *id.* § 45 (libel).

34. *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964).

35. *Id.*

36. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). The court explained: [t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72 (footnotes omitted).

37. *Id.* at 572 (footnote omitted).

38. *New York Times*, 376 U.S. at 256.

39. *Id.* at 271.

40. *Id.* at 270.

41. *Id.* at 271 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)).

acted in reckless disregard of its truth or falsity.⁴² This so-called *actual malice* standard articulated in *New York Times* was extended to public figures in *Curtis Publishing Co. v. Butts*⁴³ and its companion case, *Associated Press v. Walker*.⁴⁴

Actions brought against media defendants for invasion of privacy claims also raise first amendment considerations. The extent, however, to which the constitutional requirements outlined in *New York Times* and its progeny apply to false light privacy actions is still unclear. In 1967, the Supreme Court first considered the conflict between the first amendment free speech provision and the right to privacy.⁴⁵ In *Time, Inc. v. Hill*,⁴⁶ the plaintiff's home had been invaded by escaped convicts, and plaintiff and his family were held hostage for nineteen hours.⁴⁷ A few years later, a writer published a play which was a fictionalized version of the incident.⁴⁸ In 1955, *Life* magazine published an article about the play, with accompanying photographs, which described the play as a reenactment of the actual experiences of the Hill family and implied that certain fictitious incidents in the play had actually occurred.⁴⁹ The plaintiff alleged that the magazine article knowingly gave a false impression that the play was a realistic account of his family's encounter with the convicts.⁵⁰ Hill sued for damages under a New York statute⁵¹ providing a cause of action to a person whose name or picture is used without consent for commercial purposes.⁵²

In *Time*, the United States Supreme Court held that the *New York Times* actual malice standard of liability was applicable to actions for false light invasion of privacy.⁵³ The Court reasoned that the constitutional protections for speech and press embrace *all* matters of public interest and do not bear an "inverse ratio to the timeliness and importance of the ideas seeking expression."⁵⁴ Therefore, al-

42. *Id.* at 279-80.

43. 388 U.S. 130, 155 (1967).

44. *Id.* *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker* were decided in the same opinion. *Id.* at 130.

45. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

46. *Id.*

47. *Id.* at 378.

48. *Id.*

49. *Id.* at 377.

50. *Id.* at 376-77.

51. Plaintiff brought this action under New York Civil Rights Law sections 50, 51. *Id.* at 376.

52. *Id.*

53. *Id.* at 387-88.

54. *Id.* at 388 (citing *Bridges v. California*, 314 U.S. 252, 269 (1941)).

though the magazine article might not have been a matter of great importance to the public, the article was worthy of constitutional protection.⁵⁵ The *Time* court also emphasized the serious impediment to free speech which would arise by requiring verification of the facts contained in a news article.⁵⁶ To allow the plaintiffs to bring a privacy claim against a media defendant on a mere negligence theory would inhibit the sort of debate on public issues that is protected by the first amendment.⁵⁷ Thus, the Court in *Time, Inc. v. Hill* determined that the constitutional guarantees of free speech and press precluded recovery on a false light claim with regard to matters of public interest, without proof that the defendant had acted with actual malice.⁵⁸

The present authority of *Time, Inc. v. Hill* is somewhat unclear following more recent defamation cases. In a 1971 libel case, *Rosenbloom v. Metromedia, Inc.*,⁵⁹ the United States Supreme Court extended the actual malice standard beyond public officials and public figures to all "matters of public or general concern."⁶⁰ A few years later this position was repudiated in *Gertz v. Robert Welch, Inc.*⁶¹ Gertz was a lawyer who represented the family of a youth who was killed by a policeman.⁶² The defendant published an article alleging that Gertz had arranged a "frame-up" of the policeman, and that Gertz was a communist with a criminal record.⁶³ The Court in *Gertz* held that in a defamation action the actual malice standard is applicable only to public officials and public figures.⁶⁴ A private individual, such as

55. *Id.* at 388. The court explained:

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press.

Id.

56. *Id.* at 389.

57. *Id.* The court stressed that even negligence would be an elusive standard, especially when the content of the speech affords no warning of the prospective harm to another: "a negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." *Id.*

58. *Id.* at 387-88.

59. 403 U.S. 29 (1971).

60. *Id.* at 48.

61. 418 U.S. 323 (1974).

62. *Id.* at 325.

63. *Id.* at 325-26.

64. *Id.* at 345.

the plaintiff in *Gertz*, need only show that the defendant was negligent in failing to determine the truth or falsity of the published statement in order to satisfy United States Constitutional requirements.⁶⁵

The majority in *Gertz* noted the importance of distinguishing among defamation plaintiffs since private individuals are more vulnerable to injury than public individuals.⁶⁶ The Court explained that public figures generally have greater access to the media than private individuals, and thus have a more realistic opportunity to counteract false statements.⁶⁷ More importantly, private individuals are more deserving of protection against defamation. Unlike public figures, private individuals generally have not thrust themselves to the forefront of a particular controversy, thereby voluntarily exposing themselves to an increased risk of defamatory falsehoods concerning them.⁶⁸

The effect of *Gertz* upon the holding in *Time, Inc. v. Hill* is still uncertain.⁶⁹ *Gertz* represents a repudiation of the view that the actual malice standard must apply to all defamation actions arising out of a matter of "public interest."⁷⁰ The reasoning of *Gertz* could also be applied to false light actions brought by private individuals. If the rule from *Time, Inc. v. Hill* were modified in accordance with *Gertz*, then the *New York Times* actual malice rule would apply to plaintiffs who are public officials or public figures, and the negligence rule would apply to private plaintiffs.⁷¹

In *Cantrell v. Forest City Publishing Co.*,⁷² the United States Supreme Court sustained a recovery on a false light invasion of privacy theory.⁷³ In *Cantrell*, the plaintiffs' privacy claim was based on false and inaccurate statements contained in a news article about the destitute family of the victim of a bridge disaster.⁷⁴ The Cantrells alleged that the false story subjected them to ridicule and pity.⁷⁵ The

65. *Id.* at 347. The court decided that as long as states do not impose liability without fault, the states are entitled to determine the appropriate standard of liability for a publisher of defamatory statements injurious to a private individual. *Id.*

66. *Id.* at 344.

67. *Id.*

68. *Id.* at 345. A public individual, on the other hand, has relinquished part of the interest in the protection of the individual's own good name, and consequently has a less compelling call for redress of injury inflicted by a defamatory falsehood. *Id.*

69. RESTATEMENT (SECOND) OF TORTS § 652E comment d (1976).

70. See *Gertz*, 418 U.S. 323 (1974).

71. RESTATEMENT (SECOND) OF TORTS § 652E comment d (1976).

72. 419 U.S. 245 (1974).

73. *Id.* at 254.

74. *Id.* at 247-48.

75. *Id.* at 248.

plaintiffs also claimed that they suffered "outrage, mental distress, shame, and humiliation" as a result of the article.⁷⁶ The Court held that the newspaper was liable for printing the false statements since the evidence was sufficient to support a jury finding that the story had been printed with reckless disregard as to the truth or falsity of its contents, thereby meeting the *New York Times* actual malice standard.⁷⁷ The Court, however, bypassed the opportunity to address the question of whether a state may apply a negligence standard of liability in false light actions involving a private individual, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false light cases.⁷⁸

C. Trends in California False Light Cases

California courts have recognized a cause of action for invasion of privacy since the landmark California decision of *Melvin v. Reid*.⁷⁹ In *Melvin*, the California Court of Appeal for the Fourth District recognized a cause of action for invasion of privacy based upon the publication of *true* but discrediting events in the plaintiff's past.⁸⁰ Later cases extended the scope of an actionable invasion of privacy to include recovery based on offensive publicity that was *false*.⁸¹ For example, in *Kerby v. Hal Roach Studios*,⁸² the court upheld a complaint based upon a movie studio's publicity stunt. In *Kerby*, the defendant had mailed out one thousand copies of a letter, signed with the name of the plaintiff,⁸³ which suggestively invited the male addressees to a rendezvous at a movie theater.⁸⁴ The plaintiff brought

76. *Id.*

77. *Id.* at 252-53. See *supra* text accompanying notes 42-44.

78. *Id.* at 250-51. The court decided not to rule on this question because proper objections were not made at trial. *Id.* at 250.

79. 112 Cal. App. 285, 297 P. 91 (1931).

80. *Id.* In *Melvin*, a reformed prostitute who had been tried and acquitted of murder seven years earlier, sued the defendants for invasion of privacy after defendants aired a motion picture ("The Red Kimono") based on true facts of the plaintiff's past. The court affirmed her right to recover damages for invasion of privacy, stating:

[P]ublication by respondents of the unsavory incidents in the past life of appellant after she had reformed, coupled with her true name, was not justified by any standard of morals or ethics known to us and was a direct invasion of her inalienable right guaranteed to her by our [California] Constitution, to pursue and obtain happiness.

Id. at 292, 297 P. at 93.

81. *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 213, 127 P.2d 577, 581 (1942).

82. *Id.* at 214, 127 P.2d at 582.

83. The name of the plaintiff was also the name of the lead female character in a new film produced by the defendant. *Id.* at 208-09, 127 P.2d at 578-79.

84. *Id.*

an action for invasion of privacy, but did not pursue a libel claim.⁸⁵ The *Kerby* court noted that "[t]he letter complained of here might very well have formed the basis of a charge of libel," but nevertheless upheld the complaint on the independent ground of invasion of privacy.⁸⁶

Ten years after *Kerby*, the California Supreme Court recognized a cause of action for false light for the first time.⁸⁷ In *Gill v. Curtis Publishing Co.*,⁸⁸ the court upheld a complaint based upon the publication of a photograph of a husband and wife, taken as they sat in an amorous pose, to illustrate what the magazine article described as a "wrong" kind of love, "founded upon 100 per cent sex attraction."⁸⁹ The California Supreme Court held that the plaintiffs had adequately stated a cause of action for false light because the publication depicted the plaintiffs as persons whose only interest in each other was sexual, a characterization that might seriously impinge upon their sensibilities.⁹⁰ The plaintiffs alleged injuries and damages in substantial compliance with the statutory cause of action for libel.⁹¹ The court maintained, however, that the right of privacy was "independent of the common rights of property, contract, reputation, and physical integrity."⁹² Furthermore, in discussing the standard and measure of damages, the court focused on the allegation of mental distress rather than on injury to reputation, and held that pleading injury to peace of mind was sufficient to sustain a cause of action for false light.⁹³

California courts have long recognized the distinction between the injury sustained in libel and false light cases.⁹⁴ The courts, however,

85. *Id.* at 214, 127 P.2d at 581.

86. *Id.* at 213-14, 127 P.2d at 581. The court further stated that the plaintiff would be entitled to bring a privacy claim even if she had failed to post a bond for costs, which was then required to maintain a suit for defamation. *Id.*

87. *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 239 P.2d 630 (1952).

88. *Id.*

89. *Id.* at 275, 239 P.2d at 632.

90. *Id.* at 279, 239 P.2d at 634.

91. *Id.* at 276, 239 P.2d at 632. Libel is defined as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." CAL. CIV. CODE § 45 (West 1982). The complaint in *Gill* alleged that the defendant's publication had "caused plaintiffs to be held up to public scorn, ridicule, hatred, contempt and obloquy and did rob and deprive plaintiffs of the benefits of public confidence, respect and esteem and injure said plaintiffs in their business and social contacts and associations and in their reputations and health." *Gill*, 38 Cal. 2d at 276, 239 P.2d at 632.

92. *Id.* (emphasis added).

93. *Id.* at 281, 239 P.2d at 635.

94. See, e.g., *Fairfield v. American Photocopy Equipment Co.*, 138 Cal. App. 2d 82, 291

have been inconsistent in applying statutory limitations on libel claims to false light cases. For example, in *Kerby v. Hal Roach Studios*,⁹⁵ the Court of Appeal for the Second District held that the plaintiff was not precluded from bringing her claim even though she did not comply with a California statute requiring a bond for costs to be filed in libel actions.⁹⁶ In *Fairfield v. American Photocopy Equipment*,⁹⁷ the same court failed to consider the possible applicability of the libel statute requiring proof of special damages⁹⁸ to false light claims.⁹⁹ In *Fairfield*, the plaintiff was an attorney who brought a false light action based on an advertisement which falsely stated that the plaintiff was a satisfied user of the defendant's business machine.¹⁰⁰ Although Civil Code section 45a had been enacted several years prior to the *Fairfield* decision, the court made no mention of a possible relationship to false light actions, and allowed the plaintiff to prevail without proof of special damages, as would be required in a libel action.¹⁰¹

The first case to apply a statutory limitation on recovery for libel to a false light action was *Werner v. Times-Mirror Co.*¹⁰² In *Werner*,

P.2d 194 (1955). In *Fairfield*, plaintiff was an attorney who sought to prove that he had been ridiculed by other lawyers on account of an advertisement that stated he was a satisfied user of defendant's machine, when in fact he was not. The court explained:

The gist of the cause of action in a privacy case is not injury to the character or reputation, but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community. *The right of privacy concerns one's own peace of mind, while the right to freedom from defamation concerns primarily one's reputation.* *Id.* at 86, 291 P.2d at 197 (emphasis added) (citations omitted). Based on this distinction, the *Fairfield* court found that the plaintiff was entitled to recovery upon proof of injury to the plaintiff's feelings, without proof of further, special damages.

Id. at 89-90, 291 P.2d at 198-99.

95. 53 Cal. App. 2d 207, 127 P.2d 577 (1942).

96. *Id.* at 214, 127 P.2d at 581-82. The statute provided in pertinent part:

In an action for libel or slander the Clerk shall, before issuing the summons therein, require a written undertaking on the part of the plaintiff in the sum of five hundred dollars, with at least two competent and sufficient sureties, . . . to the effect that if the action be dismissed or the defendant recover judgment, that they will pay such costs and charges as may be awarded against the plaintiff by judgment. . . . An action brought without filing the undertaking required shall be dismissed.

1872 Cal. Stat. ch. CCCLXXVII, sec. 1, at 533 (Act concerning actions for libel and slander).

97. 138 Cal. App. 2d 82, 291 P.2d 194 (1955).

98. See *supra* note 2 and accompanying text.

99. *Fairfield*, 138 Cal. App. 2d 82, 89-90, 291 P.2d 194, 199.

100. *Id.* at 85, 291 P.2d at 196.

101. *Id.* at 89-90, 291 P.2d at 199. The court allowed the plaintiff to recover general damages without a showing of specific loss, and noted that: "The fact that damages resulting from an invasion of the right of privacy cannot be measured by a pecuniary standard is not a bar to recovery." *Id.* at 88, 291 P.2d at 198.

102. 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961).

the claim for false light invasion of privacy was based on false statements in an article published by the Los Angeles Times concerning the impending marriage of the plaintiff, and certain events in his past.¹⁰³ The court confronted the issue of whether under Civil Code section 48a,¹⁰⁴ a libel statute, the plaintiff should be allowed to proceed with his false light claim for general damages without alleging that the defendant had refused to comply with a timely demand for a retraction.¹⁰⁵ If section 48a was found to apply to false light actions, the plaintiff would be unable to recover general damages without proof of a refused demand for a retraction.¹⁰⁶ The *Werner* court concluded that section 48a represents a legislative declaration of public policy concerning rights of action against media defendants based on libelous statements.¹⁰⁷ The court refused to allow an "evasion" of the statutory protections set out in section 48a in cases where the allegedly false publication was libelous.¹⁰⁸ To allow the action to proceed with respect to non-libelous but allegedly false publications would clearly dilute the effect of the libel statute.¹⁰⁹ Therefore, since the plaintiff in *Werner* had failed to demand a timely retraction, he was precluded from recovering general damages.¹¹⁰

The California Supreme Court adopted the *Werner* holding in *Kapellas v. Kofman*.¹¹¹ In *Kapellas*, the privacy claim of a political

103. *Id.* at 114-15, 14 Cal. Rptr. at 210-11.

104. California Civil Code section 48a provides in pertinent part:

In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. . . . 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other.

CAL. CIV. CODE § 48 (West 1982).

105. 193 Cal. App. 2d at 121-22, 14 Cal. Rptr. at 214-15.

106. CAL. CIV. CODE § 48a. *See supra* note 104.

107. 193 Cal. App. 2d at 123, 14 Cal. Rptr. at 216. In an earlier decision, *Werner v. Southern California Associated Newspapers*, 35 Cal. 2d 121, 216 P.2d 825 (1950), the California Supreme Court upheld the constitutionality of section 48a. That court held that the California Legislature might reasonably conclude that the public interest in the dissemination of news outweighs the potential injury to an individual following publication of a libelous statement. *Id.* at 128, 216 P.2d at 830. Furthermore, the court found that the legislature "may properly encourage and protect news dissemination by relieving newspapers and radio stations from all but special damages resulting from defamation, upon the publication of a retraction." *Id.*

108. 193 Cal. App. 2d at 121-22, 14 Cal. Rptr. at 215.

109. *Id.* at 123, 14 Cal. Rptr. at 216.

110. *Id.* at 120-22, 14 Cal. Rptr. at 214-15.

111. 1 Cal. 3d 20, 459 P.2d 912, 81 Cal. Rptr. 360 (1969).

candidate was founded on the publication of false statements about her children allegedly drawn from the local "police blotter."¹¹² Since the plaintiff's false light action was based on the allegedly *false* nature of the editorial statements, the court determined the action was substantively equivalent to a libel claim.¹¹³ The court concluded that the false light claim must meet the same requirements as a libel claim, including proof of actual malice and demand for a retraction pursuant to section 48a.¹¹⁴ Thus, at the time *Fellows v. National Enquirer* was decided, California law remained unsettled concerning the applicability of all defamation statutes to false light claims. Although the California Supreme Court had determined that the retraction demand requirement of Civil Code section 48a applies to false light cases, plaintiffs were still able to avoid the special damage requirement of Civil Code section 45a by bringing a false light claim rather than a libel claim.

II. THE CASE

A. The Facts

On August 17, 1982, the *National Enquirer* published a photograph of television producer Arthur Fellows with actress Angie Dickinson, over the caption "Angie Dickinson—Dating a Producer."¹¹⁵ A brief article accompanying the photograph proclaimed: "Gorgeous Angie Dickinson's all smiles about the new man in her life—TV producer Arthur Fellows. Angie's steady—dating Fellows all over Tinseltown, and happily posed for photographers with him as they exited the swanky Spago restaurant in Beverly Hills."¹¹⁶ Fellows immediately demanded a retraction under California Civil Code section 48a,¹¹⁷ asserting that he "had never dated Miss Dickinson, is not 'the new man in her life', and has been happily married to Phyllis Fellows for the last 18 years."¹¹⁸ The *Enquirer* refused to print a retraction.¹¹⁹

112. *Id.* at 26-27 n.2, 459 P.2d at 914 n.2, 81 Cal. Rptr. at 362-63 n.2.

113. *Id.* at 35 n.16, 459 P.2d at 921 n.16, 81 Cal. Rptr. at 369 n.16.

114. *Id.* The court further noted that since the complaint contained a specific cause of action for libel, the false light invasion of privacy claim was superfluous and should be dismissed. *Id.*

115. *Fellows v. National Enquirer*, 42 Cal. 3d 234, 236, 721 P.2d 97, 98, 228 Cal. Rptr. 215, 216 (1986).

116. *Id.*

117. *Id.* See *supra* note 104 (text of CAL. CIV. CODE § 48a (West 1985)).

118. 42 Cal. 3d at 236, 721 P.2d at 98, 228 Cal. Rptr. at 216. Statements made at trial

Fellows subsequently sued, alleging several causes of action including libel and false light.¹²⁰

The libel count alleged defamation on facts extrinsic to the article published by the *Enquirer*.¹²¹ Fellows asserted that the article was interpreted by those who knew of his marital status to mean that he was engaging in "improper and immoral conduct."¹²² The false light action was based on the same factual allegations.¹²³ Both causes of action alleged that the *Enquirer* had published the article with knowledge that the statements were false, or with reckless disregard for whether or not they were false.¹²⁴

The *Enquirer* demurred to the complaint, attacking both the libel and false light claims on the ground that special damages had not been pleaded with sufficient specificity.¹²⁵ The *Enquirer* also argued that the false light claim was redundant of the libel claim and should therefore be dismissed.¹²⁶ After making several amendments to his complaint,¹²⁷ Fellows withdrew his libel claim but proceeded with the false light cause of action.¹²⁸ Fellows conceded that he had not suffered any special damages and sought general damages only for shame, mortification, and hurt feelings stemming from the invasion of privacy.¹²⁹

The trial court dismissed the action, stating that under California Civil Code section 45a, which governs the damages requirement for libel actions, Fellows was required to prove special damages in order

indicated that the *Enquirer* photograph had been taken as Fellows and Dickinson left a restaurant after dining with Mrs. Fellows and one or two other people. *Id.* at n.3.

119. 42 Cal. 3d at 236, 721 P.2d at 98, 228 Cal. Rptr. at 216.

120. *Id.* at 236, 721 P.2d at 98, 228 Cal. Rptr. at 217. Fellows also claimed intentional and negligent infliction of emotional distress and "conscious disregard." Mrs. Fellows was added as a plaintiff in the latter causes of action. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 236-37, 721 P.2d at 98, 228 Cal. Rptr. at 217.

125. *Id.*

126. *Id.*

127. *Id.* at 237-38, 721 P.2d at 98-99, 228 Cal. Rptr. at 217-18. The trial court dismissed the cause of action for intentional infliction of emotional distress upon the ground that Fellows had failed to sufficiently allege "outrageous conduct", a necessary element of such a cause of action. *Fellows v. National Enquirer*, 211 Cal. Rptr. 809, 813 n.3 (1985), *rev'd* 42 Cal. 3d 234 (1986) (discussion of this case is for purposes of illustration only). Pursuant to California Rules of Court sections 976(b) and 976.1, the California Supreme Court has ordered the *Fellows* opinion depublished. CAL. R. Cr. 976(b), 976.1 (West Supp. 1987).

128. 42 Cal. 3d at 238, 721 P.2d at 99, 228 Cal. Rptr. at 218. Fellows filed an original complaint and two amended complaints and the *Enquirer* demurred to each complaint before the trial judge finally dismissed the suit. *Id.*

129. *Id.*

to bring a successful action under a false light theory.¹³⁰ The trial court relied expressly on the decision in *Kapellas v. Kofman*.¹³¹ The trial court interpreted *Kapellas* to mean false light claims should be treated as identical to libel claims and thus subject to all the statutory limitations placed on libel claims.¹³² The Court of Appeal for the Second District reversed the decision.¹³³ The Court of Appeal held that the special damages requirement of libel *per quod* actions should not apply since false light is an independent tort which protects different interests than those at issue in a defamation action.¹³⁴ The *National Enquirer* appealed to the California Supreme Court.¹³⁵

B. The Opinion

In *Fellows v. National Enquirer*,¹³⁶ the California Supreme Court addressed the issue of whether the requirement of proof of special damages in libel actions should be applied to actions brought under the theory of false light invasion of privacy.¹³⁷ In an opinion written by Justice Broussard,¹³⁸ the supreme court focused on two distinct issues. The first issue was whether the conceptual difference between libel and false light justifies making actionable an otherwise constitutionally protected statement.¹³⁹ The second issue was whether the legislative policy embodied in section 45a is applicable to false light actions.¹⁴⁰ The *Fellows* court concluded that the policy behind section 45a is applicable to false light actions based upon defamatory publications, when those publications are not defamatory on their face.¹⁴¹

1. Constitutional Considerations

In examining the applicability of a special damages requirement to false light actions, the *Fellows* court stressed the importance of

130. *Id.*

131. *Id.* See *supra* text accompanying notes 111-14.

132. See *Fellows v. National Enquirer*, 211 Cal. Rptr. 809, 818 (1985), *rev'd* 42 Cal. 3d 234 (1986). See *supra* note 127 and accompanying text.

133. *Id.*

134. *Id.*

135. *Fellows v. National Enquirer*, 42 Cal. 3d 234, 721 P.2d 97, 228 Cal. Rptr. 215 (1986).

136. *Id.*

137. *Id.*

138. Chief Justice Bird wrote a concurring opinion. *Fellows*, 42 Cal. 3d at 252, 721 P.2d at 109, 228 Cal. Rptr. at 228.

139. *Id.* at 247-48, 721 P.2d at 106, 228 Cal. Rptr. at 224-25.

140. *Id.* at 250-51, 721 P.2d at 107-08, 228 Cal. Rptr. at 226-27.

141. *Id.* at 251, 721 P.2d at 108-09, 228 Cal. Rptr. at 227.

carefully guarding the constitutional protections for freedom of the press.¹⁴² The court pointed out the danger of upsetting the delicate balance that has developed in the law of defamation between the protection of an individual's interest in redressing injury from false publications and the protection of societal interests in vigorous debate and free dissemination of the news.¹⁴³ The supreme court found that the appellate court decision was based on a "superficially logical syllogism" stemming from the presumed theoretical differences between false light and libel.¹⁴⁴ The lower court had asserted that libel is intended to protect reputational interests, whereas a false light action is aimed at redressing injury to the plaintiff's feelings and peace of mind.¹⁴⁵ Since section 45a is concerned only with protection of the plaintiff's reputation,¹⁴⁶ the court of appeal concluded that the special damage rule was "wholly inapposite" to a cause of action for false light invasion of privacy when the plaintiff is seeking compensation for damages to personal feelings.¹⁴⁷

The California Supreme Court rejected this distinction in a false light complaint based upon a defamatory publication.¹⁴⁸ Even if libel and false light actually protect separate and distinct interests, such a conceptual difference does not warrant an abandonment of the constitutional protections granted to the press.¹⁴⁹ Citing *New York Times v. Sullivan*,¹⁵⁰ the *Fellows* court noted the importance of balancing the individual interest in reputation against the constitutional interest of free speech.¹⁵¹ The supreme court asserted that the existing balance results in the protection of some defamatory speech because a certain amount of "breathing space" is necessary to maintain the vitality of the freedoms of speech and press.¹⁵² Although a false light action redresses a different form of injury than a defamation action, the court explained that this difference does not

142. *Id.* at 252, 721 P.2d at 109, 228 Cal. Rptr. at 227-28. In her concurring opinion, Chief Justice Bird reiterated the importance of these constitutional concerns, particularly as applied to actions brought by public officials. *Id.* at 252-53, 721 P.2d at 109, 228 Cal. Rptr. at 228.

143. *Id.* at 248, 721 P.2d at 106, 228 Cal. Rptr. at 225.

144. *Id.* at 247, 721 P.2d at 105, 228 Cal. Rptr. at 224.

145. *Id.*

146. *Id.* at 247-48, 721 P.2d at 105-06, 228 Cal. Rptr. at 224.

147. *Id.*

148. *Id.* at 247-48, 721 P.2d at 106, 228 Cal. Rptr. at 224-25.

149. *Id.*

150. 376 U.S. 254 (1964).

151. *Fellows*, 42 Cal. 3d at 248, 721 P.2d at 106, 228 Cal. Rptr. at 225.

152. *Id.*

lessen the importance of "uninhibited, robust, and wide-open public discourse" by the press.¹⁵³ Furthermore, the constitutional protections afforded defamatory statements in the interest of providing a generous zone of lawful speech should not be abrogated merely because the statements contain a privacy-invading element.¹⁵⁴

2. Legislative Policy Behind Section 45a

The *Fellows* court explained that in most cases where defamation limitations has been applied to false light claims, the courts readily acknowledged the theoretical differences in the interests protected by the two torts.¹⁵⁵ But the court also recognized that these different interests may be implicated by identical conduct.¹⁵⁶ The *Fellows* court relied on the case of *Werner v. Times Mirror Co.*,¹⁵⁷ which dealt with this same issue. In *Werner*, a public figure brought suit based on an article in the Los Angeles Times which contained false and misleading facts about his past.¹⁵⁸ Werner brought suit for false light type invasion of privacy, rather than for defamation, but failed to make a demand for a retraction before filing suit, as was required for libel actions under California Civil Code section 48a.¹⁵⁹ The Court of Appeal for the Second District discussed whether defamation restrictions should be applied to false light claims even though the torts protect different interests.¹⁶⁰ The court determined that when both interests were injured by the *same publication*, the false light claim should not survive if the libel claim necessarily fails due to statutory restrictions.¹⁶¹ The *Werner* court reasoned that to hold otherwise would be to ignore the declaration of public policy embodied in section 48a.¹⁶²

In *Fellows*, the California Supreme Court disagreed with the narrow interpretation of the policy behind California Civil Code section 45a reached by the court of appeal.¹⁶³ On its face, section 45a is concerned only with the tort of libel, and does not purport to address

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 248-49, 721 P.2d at 106-07, 228 Cal. Rptr. at 225.

157. 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961).

158. *Id.* at 113-14, 14 Cal. Rptr. at 209-10.

159. *Id.* at 120-21, 14 Cal. Rptr. at 214.

160. *Id.* at 119, 14 Cal. Rptr. at 213.

161. *Id.* at 122-23, 14 Cal. Rptr. at 215-16.

162. *Id.* at 123, 14 Cal. Rptr. at 216.

163. 42 Cal. 3d at 249, 721 P.2d at 107, 228 Cal. Rptr. at 225-26.

a cause of action for false light.¹⁶⁴ The supreme court also relied on the case of *MacLeod v. Tribune Publishing Co.*¹⁶⁵ In *MacLeod*, a candidate for a local political office brought a libel suit against a newspaper, based upon an article which implied that the plaintiff was a communist sympathizer.¹⁶⁶ The plaintiff alleged special damages pursuant to section 45a.¹⁶⁷ Justice Traynor determined that the legislative purpose behind section 45a "is to protect publishers who make statements innocent in themselves that are defamatory only because of extrinsic facts known to the reader."¹⁶⁸

The court of appeal in *Fellows* had interpreted this language to mean that section 45a is concerned only with protection of plaintiff's reputation,¹⁶⁹ and not with protection of plaintiff's feelings as in a privacy cause of action.¹⁷⁰ Therefore, the court of appeal reasoned, the special damage requirement of section 45a is inapplicable to cases brought under the false light theory.¹⁷¹ The supreme court disagreed with this reading of *MacLeod*, finding that section 45a does not merely protect reputational interests.¹⁷² Instead, *MacLeod* suggests that section 45a evinces a legislative intent to safeguard free speech protections for innocent publishers *no matter what form* the plaintiff's injury happens to take.¹⁷³ The supreme court determined that section 45a manifests a legislative finding that the imposition of liability on a media defendant for a publication which is not defamatory on its face, and has not caused actual pecuniary injury, would

164. See CAL. CIV. CODE § 45a (West 1985).

165. 52 Cal. 2d 536, 343 P.2d 36 (1959). The district court of appeal had also relied on *MacLeod*, with different results.

166. *Id.* at 542-43, 343 P.2d at 39.

167. *Id.* at 543, 343 P.2d at 39.

168. *Id.* at 550, 343 P.2d at 43-44. The court explained:

For example, a newspaper might erroneously report that 'Mrs. A gave birth to a child last night.' Mrs. A has been married only a month. The language used will take on a defamatory meaning only to those who know when Mrs. A was married, and many of them will also know that the paper made a mistake. In such a case, general damages for loss of reputation may be trivial, and the paper's mistake may have been innocent, for its report would not alert it to the possibility of defamation. It is not unreasonable therefore to require proof of special damages to establish a cause of action.

Id.

169. Reputation is the estimation in which one is generally held by others. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1929 (1981).

170. 211 Cal. Rptr. 809, 822 (1985). See *supra* note 127 and accompanying text (the California Supreme Court has ordered this opinion depublished).

171. 211 Cal. Rptr. at 824. See *supra* note 127 and accompanying text (the California Supreme Court has ordered this opinion depublished).

172. *Fellows*, 42 Cal. 3d at 249, 721 P.2d at 107, 228 Cal. Rptr. at 225-26.

173. *Id.*

place too great a burden on the editorial process and would interfere with the free dissemination of the news.¹⁷⁴ The court explained that even though the plaintiff had deleted injury to *reputation* from his complaint and was seeking to recover only for injury to his *sensibilities*, "such tactic could not alter the legislative judgment that such injuries alone are inadequate to outweigh the burden on free press."¹⁷⁵

The supreme court decision in *Fellows* also rejected the appellate court view that adequate protection is afforded innocent publishers by the constitutional requirement of proving actual malice.¹⁷⁶ The supreme court noted that this objection could be raised about virtually all restrictions on defamation actions that are not constitutionally compelled.¹⁷⁷ While the argument might be raised that any false statement published with actual malice should automatically be grounds for a civil remedy, the supreme court explained that such reasoning is flawed.¹⁷⁸ This reasoning assumes both the falsity of the statement and the actual malice on the part of the defendant. Since both determinations must be made by the jury,¹⁷⁹ the unpredictability of jury verdicts would pose a considerable threat to a media defendant.¹⁸⁰ The *Fellows* court determined that such a potential burden would clearly inhibit freedom of the press, and would therefore be unjustified absent a showing of special damages.¹⁸¹

Finally, the *Fellows* court recognized that almost every published defamation would support an action for false light as well as an action for libel.¹⁸² Therefore, plaintiffs should not be allowed to circumvent the special damage requirement of section 45a simply by suing only for false light rather than libel.¹⁸³ Circumvention in this way would defeat the legislative purpose of providing a "zone of protection for the operation of a free press."¹⁸⁴ Based on these

174. *Id.* at 250, 721 P.2d at 107-08, 228 Cal. Rptr. at 226.

175. *Id.* (emphasis added).

176. *Id.*

177. *Id.* at 250, 721 P.2d at 108, 228 Cal. Rptr. at 226.

178. *Id.* at 250-51, 721 P.2d at 108, 228 Cal. Rptr. at 226-27.

179. *Id.*

180. *Id.* The court pointed out that a participant in judicial proceedings may be utterly free from malice, and yet in the eyes of the jury be open to imputation; or he may be cleared by the jury of the imputation, and still have to withstand the expense and distress of harassing litigation. "With such possibilities hanging over his head, he cannot be expected to speak with that free and open mind which the administration of justice demands." *Id.* at 251, 721 P.2d at 108, 225 Cal. Rptr. at 227. (quoting from Veeder, *Absolute Immunity in Defamation* 9 COLUM. L. REV. 463, 469-70 (1909)).

181. *Id.*

182. *Id.* at 251, 721 P.2d at 108, 228 Cal. Rptr. at 227.

183. *Id.*

184. *Id.*

arguments, the *Fellows* court held that the public policy embodied in section 45a is also applicable to an action for false light based upon a defamatory publication.¹⁸⁵

III. LEGAL RAMIFICATIONS

The holding in *Fellows* renders the special damage requirement of California Civil Code section 45a applicable to false light.¹⁸⁶ Under *Fellows*, a plaintiff bringing a false light claim based on a publication that is libelous *per quod* must prove special damages.¹⁸⁷ This holding clearly diminishes the viability of the false light cause of action, since pecuniary losses are frequently not associated with an injury to a plaintiff's "peace of mind."¹⁸⁸ Unless a plaintiff can prove that some form of special damages arose from this injury to peace of mind, that plaintiff will be unable to prevail in a false light action.

The *Fellows* holding expressly applies only to false light statements which are not defamatory on their face.¹⁸⁹ The opinion does not purport to apply to other forms of invasion of privacy, such as public disclosure of private facts¹⁹⁰ or misappropriation¹⁹¹ of plaintiff's name or likeness.¹⁹²

Some important questions, however, are left unanswered by *Fellows*. The court did not address the issue of whether the statutory requirement for proof of special damages would apply to a false light claim based on language that is not defamatory.¹⁹³ Courts dealing with this question in the future will probably rely on dicta in *Fellows* which emphasizes the importance of maintaining judicial protections for freedom of the press. A court might find that since

185. *Id.*

186. *Id.* at 251, 721 P.2d at 109, 228 Cal. Rptr. at 227. A substantial majority of states extend additional protections to publishers by implementing a special damages requirement. *Id.* at 251, 721 P.2d at 108, 228 Cal. Rptr. at 227.

187. *Id.* at 236, 721 P.2d at 97, 228 Cal. Rptr. at 216.

188. There are, however, a few situations in which pecuniary losses might arise from injury to privacy interests. One example would be expenses for psychiatric treatment following an injury to plaintiff's peace of mind. See generally CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA ATTORNEY'S DAMAGES GUIDE app. § 25 (damages recoverable for emotional injuries).

189. 42 Cal. 3d at 251 n.13, 721 P.2d at 109 n.13, 228 Cal. Rptr. at 227 n.13.

190. See *supra* note 16 and accompanying text.

191. *Id.*

192. 42 Cal. 3d at 251 n.13, 721 P.2d at 109 n.13, 228 Cal. Rptr. at 227 n.13. The court noted that in the public disclosure of private facts context, for example, the policies of section 45a are inapposite, since the injurious nature of the report should have been apparent on its face and the question of innocent mistake does not arise. *Id.*

193. See *Fellows*, 42 Cal. 3d 234, 721 P.2d 97, 228 Cal. Rptr. 215 (1986).

an injury based on a non-defamatory publication is likely to be somewhat less serious than one stemming from a libelous statement, a level of protection should be afforded the media defendant that is at least as high as the protection provided under a defamation claim. Therefore, under this viewpoint, a showing of special damages would probably be required.

Finally, the question still remains after *Fellows* whether there are any other restrictions placed on defamation actions that would not also be applicable to false light claims.¹⁹⁴ In focusing on the importance of safeguarding the freedoms of speech and press, however, the *Fellows* court has sent a clear signal to the lower courts. Under *Fellows*, the California Supreme Court has directed lower courts to avoid unnecessary circumvention of statutes aimed at protecting the free dissemination of the news. Thus, additional limitations on libel may be extended to false light actions, making the viability of the false light tort even more sharply diminished.

IV. CONCLUSION

In *Fellows v. National Enquirer*, the California Supreme Court held that whenever a claim of false light invasion of privacy is raised, the plaintiff must plead and prove special damages. The court found that the policy behind California Civil Code section 45a, which requires a showing of special damages in libel actions, is equally applicable to false light claims. According to the court, the special damages requirement manifests a legislative determination that liability imposed for a publication which affords no warning of its defamatory nature and has not caused actual pecuniary injury, would place too great a burden on the editorial process and would hamper the free dissemination of the news. Since virtually every defamation would support an action for false light, exempting such claims from the special damages requirement would render the statute a nullity. In holding that the plaintiff must prove special damages in order to prevail in a false light action based upon a defamatory publication, the California Supreme Court has greatly reduced the scope of the false light invasion of privacy tort.

Jeanne Ellen Courtney

194. *Id.*

